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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	FINAL ORDER
NO. 58294-41H BY MONTANA	)	
DEPARTMENT OF NATURAL RESOURCES	)	
AND CONSERVATION	)	

\* \* \* \* \*

On May 11, 1988, the Proposal for Decision in this matter was entered. The Proposal recommended that Application for Beneficial Water Use Permit No. 58294-41H be granted. Objector James T. Paugh filed exceptions to the Proposal.

Mr. Paugh objects to Conclusions of Law 2, 6, and 7. His first argument is that using the term "runoff" to describe this appropriation fails to clearly identify the period during which water will be available. I find that the period of use for this appropriation is clearly set forth, both in the Permit itself and in the hearing record. The Application for Beneficial Water Use Permit specifies in Item Nos. 6 and 9 the period of appropriation and period of use as January 1 to December 31, inclusive of each year. This period was not subsequently amended or altered by the Applicant. Finding of Fact 28 states that water will be stored during runoff events, generally during May and June, but also throughout the year whenever heavy rains occur.

The Objector's second argument is directed at Conclusion of Law 6, which holds that, in average years, there are unappropriated waters in the Middle Creek that can be stored during

CASE # 58294

runoff events in the expanded capacity reservoir. Mr. Paugh points out that approximately 40% of years are less than average. Nevertheless, the Hearing Examiner's conclusion is proper. The Water Use Act does not require that water be available every year for a permit to issue, but only in some years. In this case, a hydrology report prepared by HKM Engineers, Inc., concludes that 2,334 acre-feet of "new" water is available during 91 out of 100 years. This is sufficient to satisfy the statutory water availability test.

Finally, the Objector argues that the Hearing Examiner should have given greater weight to the information about existing water rights that he offered into evidence. However, I agree with Conclusion of Law 7 that evidence showing that total claimed water rights in the basin exceed the yield of the drainage does not necessarily mean the basin is overappropriated. Because of such factors as irrigation return flows, timing, and patterns of use, many "overclaimed" basins provide adequate use for all appropriators. In this case, the Permit is authorized for the capture and storage of surplus runoff water, which historically has not been used by other appropriators. Because the HKM report indicates that there is water available for this purpose, Conclusion of Law 7 is not erroneous.

Based upon the Findings and Conclusions, all files, records herein, and the exceptions filed, the Department of Natural Resources and Conservation makes the following:

ORDER

Application for Beneficial Water Use Permit No. 58294-41H is granted to the Montana Department of Natural Resources and Conservation subject to the terms, conditions, restrictions, and limitations listed below, to appropriate 2,334 acre-feet of water per year from January 1 to December 31, inclusive of each year, from Middle or Hyalite Creek by means of a dam in the N $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 15, Township 4 South, Range 6 East, Gallatin County, Montana. The water appropriated pursuant hereto shall be used for irrigation and municipal purposes on the Permittee's existing places of use described in Statements of Claims for Existing Water Rights numbered 119496 through 119501-s41H, and in Township 2 South, Ranges 5 and 6 East, Gallatin County. The priority date for this permit is December 3, 1984.

1. Permittee shall comply with mitigating measures listed in the Decision Notice and Finding of No Significant Impact for the Middle (Hyalite) Creek Dam Rehabilitation Project.

2. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights as provided by Montana law.

3. The water right granted by this Permit is subject to the authority of court-appointed water commissioners, if and when appointed, to admeasure and distribute to the parties using water in the source of supply the water to which they are entitled. The Permittee shall pay his proportionate share of the fees and

compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in the provisional permit.

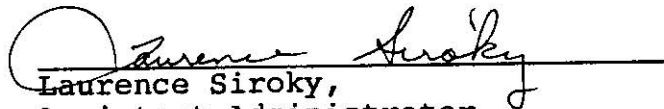
4. This Permit is granted subject to the right of the Department to modify or revoke the permit in accordance with § 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with § 85-2-115, MCA.

5. This Permit is subject to applicable provisions of the agreement dated November 12, 1987, among the Montana Power Company, the United States of America, and the State of Montana Department of Natural Resources and Conservation regarding state water use permit applications on the Upper Missouri drainage.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 21 day of February, 1989.

  
Laurence Siroky,  
Assistant Administrator  
Department of Natural Resources  
and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6816

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 21<sup>st</sup> day of February, 1989, as follows:

Sarah Bond, Legal Counsel  
Department of Natural  
and Conservation  
1520 East 6th Avenue  
Helena, MT 59620

Larry G. Peterman  
Department of Fish, Wildlife  
and Parks  
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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

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IN THE MATTER of the Application	)	FINDINGS OF FACT
for Beneficial Water Use Permit	)	CONCLUSIONS OF LAW
No. 58294-41H by Montana	)	AND PROPOSED ORDER
Department of Natural Resources	)	
and Conservation.	)	

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A hearing in the above-entitled matter was held in the Attorney General's conference room, Helena, Montana, on January 27, 1988. Applicant, the Department of Natural Resources and Conservation (the applicant), appeared and was represented by Sarah Bond, legal counsel. Objector James T. Paugh appeared without legal counsel. Objectors Montana Power Company (MPC), the Department of Fish, Wildlife and Parks (FWP), the United States Department of the Interior Bureau of Reclamation (USBR), and Frank R. Doney did not appear at the hearing. Objector Marlys Y. Paugh withdrew her objection prior to the hearing.

Evidence was presented at the hearing in the form of the testimony of Melvin McBeath, Richard L. Bondy, Dean Elliott, Scott Compton, Richard Boylan, James T. Paugh, and Robert J. Paugh. Joint Exhibit No. 1, Applicant's Exhibits Nos. 1 to 11, and Objector Paugh's Exhibits A to H were received in evidence without objection.

1           Following the hearing the parties submitted proposed  
2 findings and conclusions and briefs, and the matter was  
3 deemed submitted for a decision on April 12, 1988. Based on  
4 the foregoing, the hearing examiner now makes the following  
5 findings of fact, conclusions of law, and proposed order.  
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8                           FINDINGS OF FACT

9           1.   The applicant filed an application for a beneficial  
10 water use permit on December 3, 1984, seeking to appropriate  
11 2,334 acre feet of water from Hyalite or Middle Creek  
12 (hereinafter Middle Creek), a tributary of the East Gallatin  
13 River in Gallatin County, Montana.

14           2.   The facts pertinent to the application were  
15 published in the Bozeman Daily Chronicle, a newspaper of  
16 general circulation in the area of the source, on January 16  
17 and 23, 1985.

18           3.   The applicant generally proposes to enlarge the  
19 storage capacity of Hyalite Reservoir, an on-stream reservoir  
20 on Middle Creek, by 2,334 acre feet.

21           4.   Objections to the application were filed by MPC,  
22 FWP, USBR, James T. Paugh, Marlys Y. Paugh, and Frank R.  
23 Doney.

24           5.   MPC's objection was based on the claim that there  
25 is insufficient unappropriated water available throughout the



1 period of the requested appropriation and that granting the  
2 permit would adversely affect its prior water rights.

3 6. FWP's objection was based on the claim that the  
4 fish, wildlife, and recreational values of Hyalite Reservoir  
5 and surrounding areas could be substantially degraded by the  
6 proposed appropriation.

7 7. USBR's objection was based on the claim that there  
8 is insufficient unappropriated water throughout the proposed  
9 period of appropriation. USBR requested that the permit, if  
10 issued, be restricted to allow appropriation of water only  
11 when Canyon Ferry Reservoir is spilling excess water.

12 8. James and Marlys Paugh, husband and wife, objected  
13 on the ground that there is insufficient water in the source  
14 of supply and that issuance of the permit would adversely  
15 affect their water rights from Middle Creek and its  
16 tributaries.

17 9. Frank Doney's objection was based on his  
18 dissatisfaction with the applicant's proposal requiring  
19 shareholders of the Middle Creek Water User's Association to  
20 bear a portion of the costs of the project for which the  
21 permit was sought.

22 10. Marlys Paugh withdrew her objection prior to the  
23 hearing.

24 11. Frank Doney did not appear at the hearing, but  
25 submitted a letter for the record reiterating his objection

1 based on the cost of the project, and also questioning  
2 whether there will be sufficient runoff to fill the reservoir  
3 if the application is granted.

4 12. James Paugh appeared at the hearing, presented  
5 evidence in the form of testimony and exhibits, and submitted  
6 proposed findings and briefs following the hearing.

7 13. MPC's and USBR's objections were stricken by the  
8 Department of Natural Resources and Conservation (DNRC) on  
9 July 19, 1985.

10 14. MPC, USBR, and DNRC are involved in related  
11 litigation commonly known as the Don Brown cases. In the  
12 course of that litigation, the parties have reached an  
13 agreement (the Agreement) regarding treatment of pending  
14 permit applications in the Upper Missouri River drainage.  
15 The parties, including DNRC, have acknowledged that the  
16 Agreement governs their positions in this proceeding. In  
17 general, MPC and USBR have agreed not to participate against  
18 permit applicants in proceedings such as these, but to pursue  
19 interlocutory decrees establishing USBR's and MPC's rights in  
20 the Upper Missouri mainstem in the water courts. In the  
21 interim, DNRC has acknowledged it must execute an agreement  
22 with USBR on whether a temporary service contract (as  
23 provided for in the Agreement, para. 4c at 7) is necessary.  
24 MPC, by stipulation, has dismissed with prejudice its appeal  
25

1 of the July 19, 1985, order seeking to reinstate its  
2 objection in this proceeding.

3 15. FWP timely objected but reached a stipulation  
4 agreement with the applicant. FWP has no objection to the  
5 permit issuance if the permit is conditioned with the  
6 language of applicant's Exhibit No. 10, "Applicant agrees to  
7 comply with mitigating measures listed in the Decision Notice  
8 and Finding of No Significant Impact for the Middle Hyalite  
9 Creek Dam Rehabilitation Project." The applicant has agreed  
10 to accept this as a permit condition.

11 16. Middle Creek originates in the mountains southeast  
12 of Bozeman. The State dammed the creek in 1951, creating  
13 what is now known as Hyalite Reservoir.

14 17. Below the dam, Middle Creek flows through a narrow  
15 mountain canyon (Hyalite Canyon) for approximately eight  
16 miles, at which point the geography changes to relatively  
17 flat alluvial plain.

18 18. At the base of Hyalite Canyon are located the first  
19 major diversions from Middle Creek: Cottonwood Canal and the  
20 Bozeman city intake dam. Downstream from that point are  
21 several large, privately-owned irrigation canals which divert  
22 water from the creek.

23 19. James Paugh's place of use is approximately 22  
24 river miles downstream from the dam on Hyalite Reservoir. He  
25

1 claims prior existing water rights on Middle Creek for  
2 irrigation and stock water.

3 20. Richard L. Bondy testified for the applicant.  
4 Mr. Bondy is chief of the Engineering Bureau in the Water  
5 Resources Division of DNRC, a position he has held for 14  
6 years. Mr. Bondy, a licensed professional engineer, is in  
7 charge of the operation, maintenance, and repair of some 40  
8 conservation projects throughout the state.

9 21. Mr. Bondy testified that the application was filed  
10 because the Engineering Bureau intends to reconstruct the dam  
11 on Hyalite Reservoir, and in the process raise the dam so  
12 that more water may be stored in the reservoir. The dam is  
13 currently unsafe, as the spillway is much too small and  
14 structurally inadequate. The dam does not meet current  
15 safety requirements.

16 22. According to the application on file, the current  
17 capacity of the reservoir is 7,850 acre feet. The project  
18 proposed by the applicant would raise the dam and result in  
19 an increase in reservoir capacity of 2,334 acre feet. Thus,  
20 the capacity of the reservoir on completion of the proposed  
21 project would be 10,184 acre feet, according to the  
22 application.

23 23. The additional stored water will initially be sold  
24 to the City of Bozeman for municipal use and to other  
25 purchasers for agricultural use. Eventually all of the

1 additional water will be sold to the City of Bozeman for  
2 municipal use, under the proposal submitted by the applicant.

3 24. The applicant conducted extensive feasibility and  
4 engineering studies, as well as environmental analyses, prior  
5 to deciding on the proposed expansion project for the  
6 reservoir. The applicant was assisted by HKM Engineering,  
7 Inc., of Billings, which conducted an in-depth hydrologic  
8 potential study of the drainage where the project is  
9 proposed.

10 25. Melvin McBeath, a water resource specialist for  
11 DNRC, testified for the applicant. Applicant's Exhibit  
12 No. 1, admitted during Mr. McBeath's testimony, consists of  
13 stream gauging station records for the east and west fork of  
14 Hyalite (Middle) Creek, approximately one mile above Hyalite  
15 Reservoir, for the calendar years 1974-1985. The applicant  
16 relied on these records, as well as records from U.S.  
17 Geological Survey gauging stations, in determining that the  
18 project was feasible. The applicant also made extensive  
19 studies of irrigation water taken out of Middle Creek, and  
20 examined precipitation records to determine natural inflow  
21 over the years. The applicant determined what the irrigation  
22 demands of the creek were.

23 26. Based on all the foregoing information, the  
24 applicant concluded that there are unappropriated waters in  
25 Middle Creek that can be captured and stored in Hyalite

1 Reservoir, and used in the manner proposed by the applicant,  
2 without affecting downstream users and prior appropriators.

3 27. Applicant's Exhibit No. 4 shows the methodology  
4 used to establish that there is available, unappropriated  
5 water in the creek.

6 28. The applicant proposes to store the additional  
7 water during run-off events. While this will more often than  
8 not mean the additional storage is occurring during May and  
9 June, whenever heavy rains occur the applicant will generally  
10 use the opportunity to store additional water. The proposed  
11 change in reservoir operations will result in slightly higher  
12 average outflow between November and April and lower outflow  
13 in May and June. Applicant's Exhibit No. 5 shows the changes  
14 in reservoir inflow and outflow that will result from the  
15 project. Mr. Bondy stressed that these figures are averages.

16 29. Mr. Bondy also testified that water will not  
17 necessarily be available every year. During a dry year less  
18 water will likely be stored in the reservoir.

19 30. The application originally was filed seeking 3.23  
20 cubic feet per second (CFS) of water, up to 2,334 acre feet  
21 per year between January 1 and December 31. The applicant  
22 then sought to amend the application to more accurately  
23 reflect actual appropriative intent, which is to store water  
24 at high runoff events. The applicant and the Water Rights  
25 Bureau eventually agreed that the best way to describe an

1 appropriation effected by an onstream storage reservoir is by  
2 volume only. Thus, on August 22, 1986, the Water Rights  
3 Bureau amended the application by deleting the quantitative  
4 flow rate and substituting therefor "runoff."

5 31. Mr. Bondy testified that in his opinion the  
6 proposed means of appropriating the water (reconstruction of  
7 the dam to increase reservoir capacity) is adequate, and that  
8 this project would not interfere with any other planned uses  
9 in the area.

10 32. The 1987 Montana Legislature authorized the Board  
11 of Examiners to issue bonds for the Middle Creek  
12 rehabilitation project after the water users have entered  
13 into contractual agreements for the repayment of the cost of  
14 repair and rehabilitation at a rate of interest equal to that  
15 which must be paid on the bonds. The project will also be  
16 financed through a loan from USBR.

17 33. The soils in the area through which Middle Creek  
18 flows are porous alluvial fill. Near Mr. Paugh's place of  
19 use the area is crossed by a series of gravity-feed  
20 irrigation ditches. The water in those ditches seeps into  
21 the soil and raises the groundwater level. Mr. Paugh  
22 testified that when his upstream neighbors are irrigating  
23 heavily, his water supply is generally adequate, which  
24 indicates that the groundwater supply is well connected to  
25 the surface water.

1           34. Richard Boylan farms near Mr. Paugh. He testified  
2 that the Farmers Canal takes much of the water out of Middle  
3 Creek, upstream from Mr. Paugh, but that the creek flows  
4 again downstream from that point. This indicates that,  
5 through seepage or natural springs, the creek is revitalized  
6 despite regular diversion from it by irrigators.

7           35. Mr. Paugh stated several objections to the permit  
8 application at the hearing and, following the hearing, in his  
9 proposed findings. He contends that the application, as  
10 amended, was incomplete because of the substitution of the  
11 word "runoff" for a quantitative flow rate. He argues that  
12 "runoff" does not properly identify the period of  
13 appropriation as required by the application form. Mr. Paugh  
14 also claims generally that there is not enough water in the  
15 source of supply to provide both for the prior appropriators,  
16 specifically himself, and for the planned appropriation for  
17 which the permit is sought in this proceeding. He bases his  
18 argument on U.S. Geological Survey gauging station records,  
19 various temporary preliminary decrees in the Gallatin River  
20 Basin, and Statements of Claim for Existing Water Rights for  
21 himself and Robert Paugh, his brother. (Objector's Exhibits  
22 Nos. A-D, F-H.) Finally, he claims that historically the  
23 City of Bozeman has taken more water from the drainage than  
24 that amount to which it is entitled, that the city is  
25 currently wasting water, and that there is no firm commitment



1 from the city to purchase the additional water that would be  
2 stored if the instant permit is granted.

3 36. Mr. Paugh's filed Statement of Claim for Existing  
4 Water Rights was not decreed as filed. Claims such as these  
5 were automatically reduced prior to issuance of temporary  
6 preliminary decrees, according to testimony of Scott Compton,  
7 field manager for the Bozeman Water Rights Office.

8 37. Mr. Bondy testified that the City of Bozeman has an  
9 interest in the Hyalite Reservoir project, and Applicant's  
10 Exhibit No. 7 supports his testimony. Dean Elliott,  
11 superintendent of Bozeman's water treatment plant, testified  
12 that in 1985 and 1987, the city had to ration water due to  
13 shortages. He stated that, at least since 1984, the City of  
14 Bozeman has never taken more water out of Middle Creek than  
15 the amount to which it is entitled. He also testified that  
16 he does not know how much, if any, of that water is wasted by  
17 the city.

18  
19  
20 CONCLUSIONS OF LAW

21 1. DNRC has jurisdiction over the subject matter and  
22 the parties involved in this proceeding. § 85-2-309, MCA.

23 2. All substantive and procedural requirements of the  
24 Montana Code Annotated and the Administrative Rules of  
25 Montana were complied with in this proceeding, and the matter

1 was properly before the hearing examiner. Tit. 85, ch. 2,  
2 MCA; §§ 36.12.201 to 233, ARM.

3 3. Mr. Doney's objection does not meet the criteria of  
4 section 85-2-308(2), MCA, and therefore will not be  
5 considered in rendering a decision herein.

6 4. The objections of MPC, FWP, and the USBR shall be  
7 governed by the agreements and stipulations between the  
8 parties, referenced in Findings of Fact (FF) Nos. 14 and 15.

9 5. DNRC is required to issue a permit if an applicant  
10 proves by substantial credible evidence that the following  
11 statutory criteria have been met:

12 (a) there are unappropriated waters in the source  
13 of supply:

14 (i) at times when the water can be put to the use  
15 proposed by the applicant;

16 (ii) in the amount the applicant seeks to  
appropriate; and

17 (iii) throughout the period during which the  
18 applicant seeks to appropriate, the amount  
requested is available;

19 (b) the water rights of a prior appropriator will  
20 not be adversely affected;

21 (c) the proposed means of diversion, construction,  
and operation of the appropriation works are  
adequate;

22 (d) the proposed use of water is a beneficial use;

23 (e) the proposed use will not interfere  
24 unreasonably with other planned uses or  
developments for which a permit has been issued or  
25 for which water has been reserved.

1 § 85-2-311(1), MCA.

2 "Substantial credible evidence" is not defined in the  
3 statutes. However, the Montana Supreme Court has discussed  
4 the proper test to apply when considering whether, on appeal,  
5 a jury verdict is supported by substantial credible evidence:

6 Substantial evidence is evidence such as will  
7 convince reasonable persons and on which such  
8 persons may not reasonably differ as to whether it  
9 establishes the prevailing party's case, and, if  
all reasonable persons must conclude that the  
evidence does not establish such case, then there  
is not substantial evidence. [Citation omitted.]

10 Kukuchka v. Ziemet, 42 St. Rptr. 1916, 710 P.2d 1361 (1985).

11 The above test will be applied in deciding whether a permit  
12 should be issued to the applicant.

13 6. The applicant has proven by substantial credible  
14 evidence that the statutory criteria set out in section  
15 85-2-311, MCA, subsections (a)(i), (ii), and (iii), have been  
16 met. The exhaustive hydrological studies conducted by the  
17 applicant, with the assistance of HKM Engineering, Inc.,  
18 establish that there are unappropriated waters in Middle  
19 Creek that can be stored during runoff events in the expanded  
20 capacity reservoir, and that such waters can be put to the  
21 use proposed by the applicant (sale for municipal and  
22 agricultural use). Mr. Bondy testified that sufficient water  
23 exists to fill the additional storage capacity in an average  
24 year.  
25

1           7. Although Mr. Paugh presented evidence in the form  
2 of testimony and data to show that the total of the claimed  
3 water rights in the basin greatly exceeds the projected yield  
4 of the drainage, Mr. Compton's testimony established that  
5 water rights claims are not necessarily indicative of actual  
6 use or entitlement. Moreover, actual use, rather than  
7 filings, dictates the parameters of a water right. McDonald  
8 v. State, 43 St. Rptr. 576, 722 P.2d 598 (1986). Mr. Paugh's  
9 evidence must give way to the stronger evidence presented by  
10 the applicant that, based on in-depth hydrological studies of  
11 the drainage, there are unappropriated waters in amounts  
12 sufficient to store additional water in the reservoir during  
13 runoff events.

14           8. The applicant has proven by substantial credible  
15 evidence that the statutory criteria set out in section  
16 85-2-311(1)(b), MCA, have been met. Admittedly, in some  
17 cases, it is nearly impossible to determine with absolute  
18 certainty whether a proposed appropriation will adversely  
19 affect senior appropriators. The applicant in this case,  
20 however, has established that there are unappropriated waters  
21 in the source in sufficient quantities for the proposed  
22 project. If, therefore, sufficient unappropriated waters are  
23 available, it follows that prior appropriators will not be  
24 injured by the proposed appropriation. Further, evidence  
25 presented at the hearing tended to establish that there is no

1 direct correlation between the creek flow at and above the  
2 dam site and at Mr. Paugh's place of use, some 22 miles  
3 downstream. See FF Nos. 33, 34. This evidence further  
4 militates against a finding of adverse effect. In any event,  
5 Mr. Bondy testified that if downstream senior appropriators  
6 are in need of additional water, then a sufficient amount of  
7 water to satisfy their needs will be released from the  
8 reservoir. And, finally, the senior appropriators, including  
9 Mr. Paugh, can always seek assistance from the water  
10 commissioners or, if necessary, the Water Court, to enforce  
11 their rights.

12 9. There appears to be little question that the  
13 applicant has proven by substantial credible evidence that  
14 the statutory criteria set out in section 85-2-311(1), MCA,  
15 subsections (c), (d), and (e) have been met. Mr. Bondy's  
16 testimony concerning the criteria in subsections (c) and (e)  
17 stands unchallenged. See FF No. 31. Concerning subsection  
18 (c)'s requirement, both the use for which the applicant seeks  
19 the appropriation (sale or distribution) and the underlying  
20 uses to be made by the lessees (irrigation and municipal  
21 uses) are beneficial uses. Bailey v. Tintinger, 45 Mont.  
22 154, 122 P. 575 (1912); Holmstrom Land Co. v. Meagher County  
23 Newlan Creek Water District, 185 Mont. 409, 605 P.2d 1060  
24 (1979). Mr. Paugh's contention that the City of Bozeman is  
25 wasting water, or that the city would waste the water that it

1 would acquire as a result of this project, is not supported  
2 by the evidence. Furthermore, the proposed project is  
3 consistent with the policy of the state strongly encouraging  
4 the storage of water to reduce waste and increase its  
5 beneficial use. See, e.g., Sunset Irrigation District v.  
6 Ailport, 166 Mont. 11, 531 P.2d 1349 (1974); Federal Land  
7 Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941). The  
8 Court in Federal Land Bank specifically considered the nature  
9 of a "reservoir right," noting that a person appropriating by  
10 that means has a right to store for use what he has a right  
11 to use, "and also any additional amounts that others would  
12 not have the right to use, and that will otherwise go to  
13 waste." Id., 116 P.2d at 1012. The applicant will capture  
14 runoff water to fill its reservoir, water that would  
15 otherwise very likely go to waste.

16 Since the applicant has proven by substantial credible  
17 evidence that the statutory criteria in section 85-2-311(1),  
18 MCA, have been satisfied, DNRC is required to issue a permit,  
19 subject to the terms set forth below:

20  
21 PROPOSED ORDER

22 Subject to the following terms, conditions,  
23 restrictions, and limitations below, Application for  
24 Beneficial Water Use Permit 58294-41H is granted to the  
25 Montana Department of Natural Resources and Conservation to

1 appropriate 2,334 acre feet of water annually from Middle, or  
2 Hyalite Creek, by means of a dam in the N $\frac{1}{2}$  SW $\frac{1}{4}$ , Section 15,  
3 Township 4 South, Range 6 East, Gallatin County, Montana.  
4 The water appropriated pursuant hereto shall be used for  
5 irrigation and municipal purposes, on the permittees'  
6 existing places of use described in Statements of Claims of  
7 Existing Water Rights numbered 119496-501-s41H and in  
8 Township 2 South, Ranges 5 and 6 East, Gallatin County. The  
9 priority date for this permit is December 3, 1984.

10 1. Permittee shall comply with mitigating measures  
11 listed in the Decision Notice and Finding of No Significant  
12 Impact for the Middle (Hyalite) Creek Dam Rehabilitation  
13 Project.

14 2. This permit is subject to all prior existing water  
15 rights in the source of supply. Further, this permit is  
16 subject to any final determination of existing water rights,  
17 as provided by Montana law.

18 3. The water right granted by this permit is subject  
19 to the authority of court-appointed water commissioners, if  
20 and when appointed, to admeasure and distribute to the  
21 parties using water in the source of supply the water to  
22 which they are entitled. The permittee shall pay his  
23 proportionate share of the fees and compensation and  
24 expenses, as fixed by the district court, incurred in the  
25 distribution of the waters granted in the provisional permit.

4. This permit is granted subject to the right of the Department to modify or revoke the permit in accordance with section 85-2-314, MCA, and to enter onto the premises for investigative purposes in accordance with section 85-2-115, MCA.

5. This permit is subject to applicable provisions of the Agreement dated November 12, 1987, among the Montana Power Company, the United States of America, and the State of Montana Department of Natural Resources and Conservation regarding state water use permit applications on the Upper Missouri drainage.

DATED this 11<sup>th</sup> day of May, 1988.

James M. Scheier  
JAMES M. SCHEIER  
Hearing Examiner

## CERTIFICATE OF SERVICE

I hereby certify that I mailed a true and accurate copy of the foregoing, postage prepaid, by U.S. mail, to the following:

Sarah Bond, Legal Counsel  
Department of Natural Resources  
and Conservation  
1520 East Sixth Avenue  
Helena MT 59620-2301



1 Larry G. Peterman  
2 Department of Fish, Wildlife  
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4 Frank R. Doney  
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8 P.O. Box 1715  
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9 Regional Director  
10 Bureau of Reclamation  
Department of the Interior  
11 P.O. Box 2553  
Billings MT 59103

12 James T. Paugh  
13 1691 Hulbert East Road  
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14  
15 DATED: 11 May 1988

jeanne Wolf